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No. 86-79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PINE STREET BAPTIST CHURCH, *et al.*,
Petitioners,

vs.

SECURITIES INVESTOR PROTECTION CORPORATION
and FRED D. BRYAN, TRUSTEE,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

This suit arises in a proceeding to liquidate the business of Ambassador Church Finance/Development Group, Inc. ("Debtor") under the Securities Investor Protection Act of 1970 ("SIPA"), which created Respondent Securities Investor Protection Corporation ("SIPC")[1]. Under SIPA the "customers" (as defined) of a bankrupt broker-dealer are a preferred class of creditors. Claims for cash or securities may be satisfied from the Debtor's estate in liquidation, supplemented within limits by SIPC's funds.

The Petitioners in this case, hereinafter referred to as the "Issuers", were issuers of securities who were held to be "customers" of the Debtor pursuant to a determination by the United States Court of Appeals for the Sixth Circuit.[2] SIPC then advanced the maximum allowable amount under SIPA to the trustee for the Debtor, on behalf of each Issuer. Subsequent

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[1] 15 U.S.C. sections 78aaa *et seq.* (1982). The liquidation of the Debtor was conducted under SIPA as originally enacted in 1970. SIPA was amended by Pub. L. No. 95-283, 92 Stat. 249 (1978), Pub. L. No. 95-598, 92 Stat. 2549 (1978) and Pub. L. No. 96-433, 94 Stat. 1855 (1980). Because "these amendments do not affect the issues in this case," the Sixth Circuit below cited the current version of SIPA rather than the 1970 version. *SIPC v. Ambassador Church Finance/Development Group, Inc.* 788 F.2d 1208, 1209, n.1 (6th Cir. 1976). The Petitioners followed this convention in their Petition For A Writ of Certiorari (p.2. n.1.). SIPC will therefore cite to current law as well, making note of some linguistic changes which do not affect the result. Pursuant to this court's rule 28.1, SIPC states that it has no parent companies, subsidiaries, or affiliates.

[2] *SEC v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608 (6th Cir. 1982).

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to the receipt of funds advanced by SIPC to the trustee on their behalf, the Issuers filed the instant suit, seeking "interest" directly from SIPC. The principal question now presented to this Court is:

> Whether the Issuers may be paid interest in this liquidation proceeding, and if so, whether it may be paid directly by SIPC.

SIPC submits that the United States Court of Appeals for the Sixth Circuit correctly held that, "SIPA does not authorize the SIPC to pay interest, either to the trustee or directly to the debtor's customers. As the District Court noted in its opinion, 'Congress could have specifically provided for payment of interest out of funds of SIPC, but did not do so.' "[3]

The Sixth Circuit also held against petitioners for other independent reasons. Thus, in order for this Court to review the principal question presented, under circumstances where that question is not mooted by the other holdings below, it must also review the following two questions:

> Whether petitioners have an implied right of action against SIPC, arising under SIPA, where this Court held 11 years ago that no such right of action exists;
>
> Whether SIPC, which is statutorily immune from liability "for any action taken or omitted in good faith under or in connection with any matter contemplated by" SIPA, can be

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[3] *SIPC v. Ambassador Church Finance/Development Group, Inc., (Pine Street Baptist Church v. SIPC)*, 788 F.2d 1208, 1212 (6th Cir. 1986).

held liable where (1) no evidence of lack of good faith was introduced at trial and (2) petitioners conceded at trial that SIPC had acted in good faith.

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COUNTERSTATEMENT OF THE CASE

Nature of the Case

As the Sixth Circuit noted in this case, "[e]ssentially, a liquidation proceeding under the SIPA is a bankruptcy proceeding." 788 F.2d 1208 at 1210 (6th Cir. 1986). It has been repeatedly held that the liquidation of a brokerage firm under SIPA is a bankruptcy proceeding for all prac-

tical purposes. *See, e.g., Exchange National Bank v. Wyatt*, 517 F.2d 453 (2d Cir. 1975); *SIPC v. Charisma Securities Corp.*, 506 F.2d 1191, 1193 (2d Cir. 1974); *SEC v. Aberdeen Securities Corp.*, 480 F.2d 1121, 1128 (3d Cir. 1973), *cert. denied.*, 414 U.S. 1111 (1973); *SEC v. Wick*, 360 F.Supp. 312 (N.D. Ill. 1973). SIPA section 6(b), 15 U.S.C. section 78fff(b) requires that a liquidation proceeding under SIPA be conducted "in accordance with, and as though it were being conducted under chapters 1, 3 and 5 and subchapters I and II of chapter 7" of the Bankruptcy Code[4] which are not inconsistent with the provisions of SIPA. A trustee appointed in a SIPA proceeding has the same general powers and duties as a trustee in bankruptcy. SIPA section 7, 15 U.S.C. section 78fff-1.

Course of Proceedings, Disposition Below, and Facts

On November 7, 1974, the United States District Court for the Middle District of Tennessee appointed Fred D. Bryan as temporary receiver of the Debtor on the application of the Securities and Exchange Commission ("SEC") in its action for injunctive relief. On December 17, 1974, on the application of SIPC, that court found that the customers of the Debtor were in need of the protections afforded by SIPA and appointed Mr. Bryan as trustee for the liquidation of the Debtor's business.

The Issuers, the Petitioners herein, were claimants who filed their respective claims with the trustee. The trustee rejected them as the claims of "customers" of the Debtor, as that term is defined in SIPA section 16(2), 15 U.S.C. section 78*lll*(2), but allowed them as general creditor claims. The basis for this rejection was that the Issuers had dealt with the Debtor as issuers of securities seeking to raise

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[4] The former Bankruptcy Act, 11 U.S.C. 1 *et seq.* controls this case, rather than the Bankruptcy Code (Bankruptcy Reform Act, Pub. L. No. 95-598 (1978)) which superseded the Act. Just as recent amendments to SIPA do not affect the result (*supra*, note 1), neither does enactment of the new Code.

capital, as opposed to persons seeking to invest or trade in securities. The Issuers filed objections to the trustee's determinations, asserting entitlement to "customer" status.

The trustee, SIPC, and the Issuers agreed to proceed to litigate one of the objections so as to obtain a judicial determination as to whether such claims were eligible for protection as "customers" of the Debtor. After extensive pretrial proceedings, the trustee, SIPC, and one of the Issuers, Pine Street Baptist Church ("Pine Street"), stipulated to all of the facts surrounding the transactions between Pine Street and the Debtor.

On January 9, 1981, the District Court held that Pine Street was entitled to "customer" status under SIPA. The trustee and SIPC appealed that determination. On May 27, 1982, the United States Court of Appeals for the Sixth Circuit affirmed. *SEC v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608 (6th Cir. 1982).[5] As a result of the foregoing litigation, the Issuers' claims were allowed as "customer" claims.

Subsequently, the trustee requested SIPC to advance sufficient funds to satisfy the Issuers' claims with interest. SIPC thereafter advanced funds to the trustee to pay the Issuers' claims as allowed,[6] without interest.

Subsequent to their receipt of the funds advanced by SIPC to the trustee, the Issuers filed an adversary pro-

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[5] The Sixth Circuit carefully limited its opinion to the facts before it, stating that "[w]e do not decide whether an issuer of securities who deals with an investment banker or underwriter only in more traditional ways may be a 'customer' under the Act." 679 F.2d 608 at 613.

[6] Since the claims of two of the Issuers, Randall Memorial Free Will Baptist Church and Westgate Baptist Church were over the then existing $50,000 limit on SIPC advances specified in SIPA, SIPC advanced only $50,000 for each of those two claims. The limits of protection were raised at a later date.

ceeding within the liquidation proceeding, seeking interest directly from SIPC. Trial was held on June 13, 1984. The District Court, by a Memorandum and an Order dated November 5, 1984, held that the Issuers were entitled to interest directly from SIPC. The District Court noted that Congress "must have known" that litigation would ensue which might postpone payment of claims "for many years," and that "Congress could have specifically provided for payment of interest out of the funds of SIPC, but did not do so." Memorandum, November 5, 1984, p. 5. Nevertheless, applying "equity," and without reference to SIPA, the District Court determined that "statutory interest" was due from June 5, 1975, the date by which all other customer claims had been paid. Memorandum, November 5, 1984, p. 6. The District Court's Order of November 5, 1984 did not specify the amount of interest, but did state: "This case is closed." Both SIPC and the Issuers appealed the November 5 Order. Both sides submitted proposals to the District Court as to the amount of interest.

On January 9, 1985, by a Memorandum and an Order, the District Court detailed the amount of interest each Issuer was to be awarded as of January 31, 1985. SIPC appealed the January 9, 1985 Order; the Issuers withdrew their appeal from the November 5, 1984 Order.

The Sixth Circuit reversed the District Court, for four independent reasons.[7] First, noting that this is a bankruptcy proceeding for all practical purposes, the Sixth Circuit held that interest is not allowable under bankruptcy law unless the Debtor's estate generates a surplus. Since the Debtor's estate was insolvent, no interest would accrue in this case. *SIPC v. Ambassador Church Finance Development Group, Inc.*, 788 F.2d 1208, at 1210-1211 (9th Cir. 1986).

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[7] The Sixth Circuit did not present its reasons in the sequence given here.

Second, the Sixth Circuit held that in a SIPA proceeding, SIPA section 9, 15 U.S.C. section 78fff-3 provides the *exclusive* means for SIPC to advance funds to a trustee on account of a customer's "net equity" as defined in SIPA section 16(11), 15 U.S.C. section 78*lll*(11). The court stated that "[s]ince the 'net equity' definition does not include interest, we hold that SIPA does not authorize the SIPC to pay interest, either to the trustee or directly to the debtor's customers." 788 F.2d 1208, at 1212.

Third, the Sixth Circuit noted that the Issuers did not assert that SIPC had denied their claims to customer status in bad faith. Consequently, the court held that SIPA section 15(c), 15 U.S.C. section 78kkk(c), "excuses SIPC from any obligation to pay interest under the circumstances of this case." 788 F.2d 1208, at 1213.

Fourth, citing *SIPC v. Barbour*, 421 U.S. 412 (1975), the Sixth Circuit held that the District Court should have dismissed the action, because "SIPA does not give customers of failing broker-dealers an implied private cause of action to compel SIPC to take action under the SIPA." 788 F.2d 1208, at 1210.

As noted above, the Debtor's general estate is insolvent, and the trustee was not able to recover any assets for the fund of "customer property" as defined in SIPA section 16(4), 15 U.S.C. section 78*lll*(4). There is, consequently, no surplus in either the general estate or the fund of "customer property."[8] (Testimony of Fred Bryan, Trustee, Transcript p. 37, l.13-25).

SUMMARY OF ARGUMENT

The Issuers have failed to present an issue which is worthy of review by this court. This court should not grant

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[8] Prior to 1978, SIPA referred to a "single and separate fund." The 1978 amendments altered this concept to "customer property," which encompassed a broader range of assets than the single and separate fund.

the Petition for a Writ of Certiorari in this case for the following reasons.

1. The Sixth Circuit simply followed two centuries of consistent precedent which holds that interest is not payable in bankruptcy, absent a surplus in the bankruptcy estate. SIPC's presence in the bankruptcy does not alter this result. Had any other customer or general creditor (as distinguished from SIPC) objected to "customer" status for the Issuers, the Issuers would have been put to the same test in litigation. There is simply no law which thereafter permits the Issuers to sue the objecting creditor for damages or interest.

2. SIPA sets forth a "net equity" definition, which is a precise formula as to the amount a "customer" may receive in a SIPA proceeding. Congress did not provide for interest to be paid on a customer's net equity and this court cannot alter that precise formula established by Congress.

3. The Sixth Circuit correctly held that there is no private right of action implied in SIPA to circumvent the limitations of how much a customer may receive from SIPC.

4. The Sixth Circuit was also correct in holding that since there was no allegation at trial that SIPC disputed the Issuers' "customer" status in bad faith, SIPA section 15(c), 15 U.S.C. section 78kkk(c), prohibited a suit for interest by the Issuers.

5. There is no conflict among the United States Circuit Courts of Appeals concerning any holding of the Sixth Circuit in this case, nor is there any conflict with prior decisions of this Court.

ARGUMENT

I. The Principal Question Presented Is A Well Settled Point Of Law Which Is Not Worthy Of Review By This Court. Interest Is Not Allowable Against SIPC. Interest Is Only Allowable Against The Debtor's Estate, And Then Only If There Is A Surplus After Payment Of All Valid Claims.

As A General Rule, Interest Does Not Accrue After The Date Of Bankruptcy.

How a debtor's assets are to be distributed, and the circumstances under which interest may be allowed against a debtor's estate, are determined by federal rather than state law. *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946); *In re Leeds Homes, Inc.*, 332 F.2d 648, 649 (6th Cir. 1964).

The *Vanston Bondholders* case states the prevailing legal principle involved in this case: "[I]nterest on the debtor's obligations ceases to accrue at the beginning of the proceeding." 329 U.S. at 163. This Court stated the reason for this rule as follows:

> Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved.

Id. As stated by Mr. Justice Holmes:

> The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up.

Sexton v. Dreyfus, 219 U.S. 339, 344 (1911). As early as 1911, the *Sexton* court stated: "For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission." *Id.* The opinion in *Sexton* demonstrates the deep historical roots of this rule. The court stated "We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state. No one doubts that interest on unsecured debts stops." *Id. See also, Thomas v. Western Car Co.*, 149 U.S. 95, 116-117 (1893).

The rationale of *Sexton* reflects "the broad equitable principle that creditors should not be disadvantaged *vis-a-vis* one another by legal delays attributable solely to the time-consuming process inherent in the administration of the bankruptcy laws." *Nicholas v. United States*, 384 U.S. 678, 683 (1966).[9] The long-standing rule against post-bankruptcy interest is implicit in the Bankruptcy Act. *City of New York v. Saper*, 336 U.S. 328, 332 (1949).

This "black letter law," that interest on unsecured debts stops on the date of bankruptcy, has been consistently recognized. *See, e.g., In re King Resources Co.*, 528 F.2d 789 (10th Cir. 1976); *State Board of Equalization v. Stodd*, 500 F.2d 1208 (9th Cir. 1974); *In re Time Sales Finance Corp.*, 491 F.2d 841 (3d Cir. 1974); *In re Kerber Packing Co.*, 276 F.2d 245 (7th Cir. 1960); *In re Magnus Harmonica*

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[9] It is indicative of the weakness of the Issuers' argument that, notwithstanding the Sixth Circuit's direct reliance on this Court's opinions in the *Vanston Bondholders* and *Nicholas* cases, *see* 788 F.2d 1208, at 1211, the Issuers do not even mention them in their Petition to this Court.

Corp., 262 F.2d 515 (3d Cir. 1959); *In re Chantler Baking Co.*, 436 F.Supp. 169 (W. D. Pa. 1977).

In *Jamison v. Federal Deposit Insurance Corporation*, 149 F.2d 199, 200 (5th Cir. 1945), the court applied the prevailing law to an insured bank:

> The general rule is that where the assets of an insolvent bank in receivership are more than sufficient to pay all debts, then the creditors are allowed dividends to pay the interest due from the debtor bank, but where the assets are not sufficient to pay the principal of all debts, interest on general claims will not be computed for the period after the receiver took control. In measuring the share of each creditor in the fund, interest beyond the date of suspension is not calculated. This rule was the outgrowth of the established principles that the rights of creditors in assets are fixed as of the date said assets are transferred by operation of law to a trustee for creditors; and that *the delay in distribution is an act of the law and a necessary incident to the settlement of the estate, for which delay no interest by way of damages accrues.* [Emphasis supplied; footnotes omitted.]

While federal law provides the rule of decision, general state law is in accord. Thus, in *Farish v. Holley*, 244 Ala. 19, 12 So. 2d 88, 92 (Ala. 1943) the court held that the creditors of an insolvent bank in liquidation could not be penalized by forcing the estate to pay interest where the defunct bank had litigated the validity of a claim and lost.[10]

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[10] The court stated:

Delay in the payment of a claim against an insolvent bank in liquidation is not ground for allowing interest thereon where it is occasioned by litigation over the right of a claim to a preference. The defunct bank has a right to the litigation of questions involved in a claim made

The rule in *Farish* is designed to allow creditors to challenge questionable claims against an estate. That rationale has seen application in this liquidation.[11]

The decision of the Sixth Circuit conforms with ordinary bankruptcy law as applied to a SIPA proceeding. Had any customer or general creditor (as distinguished from SIPC) objected to "customer" status, the Issuers would have been put to the same test in litigation. Had the Issuers emerged successfully, there is simply no law which would permit them to sue the objecting creditor for damages or interest. The Issuers cite no case to the contrary. The Sixth Circuit simply recognized this standard rule.

A recent pronouncement on the subject of postpetition interest under the Bankruptcy Act (as distinguished from the Bankruptcy Code) is found in *Debentureholders Protective Committee of Continental Investment Corporation v. Continental Investment Corporation*, 679 F.2d 264 (1st Cir. 1982). In that case, the court adhered to the rule in *Vanston Bondholders, supra*, concerning interest:

> If CIC were *insolvent*, the indenture provision allowing the post-petition interest on the installments which fell due either before or after the petition was filed would not be enforceable, regardless of State law. *Vanston*, 329 U.S. p. 159 lines 23-24, pp. 163-166, 67 S.Ct. p. 238, pp. 240-41. The federal bankruptcy rule, derived from English law, provides that in the case of *insolvent*

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against it, and the general creditors should not be penalized because of the exercise of this prerogative. *Id.*

[11] Thus, the trustee and SIPC *successfully* prevented one claimant in this proceeding, Geraldine Burns, from asserting customer status. *SEC v. Ambassador Church Finance/Development Group, Inc.*, 446 F.Supp. 844 (M.D.Tenn. 1977). The effect of this was to prevent Ms. Burns from sharing in the "single and separate fund" (now known as "customer property") which is divided, pro rata, among all persons (such as the Issuers) who successfully assert "customer" status.

> debtors interest, whether stipulated in a contract or not, stops at the moment the petition in bankruptcy is filed. *Sexton v. Dreyfus*, 219 U.S. 339, 344, 31 S.Ct. 256, 257, 55 L.Ed. 244 (1911); *American Iron Co. v. Seaboard Air Line*, 233 U.S. 261-267-268, 34 S.Ct. 502, 504-05, 58 L. Ed. 949 (1914); *See New York v. Saper*, 336 U.S. 328, 330, 69 S.Ct. 554, 555, 93 L. Ed. 710 (1949).

679 F.2d at 268-269. Since there is no question that the Debtor's estate is insolvent, the same rule applies here.

Exceptions To The General Rule Concerning Interest Are Not Applicable Here.

There are certain very limited exceptions to the general rule that post-petition interest is not allowable. *See, e.g., United States v. Bass*, 271 F.2d 129 (9th Cir. 1959). Those exceptions were well summarized by the Sixth Circuit in this case. 788 F.2d 1208, at 1211, n.4. After reciting the general rule that post-bankruptcy interest is not allowed, the court noted that interest can be awarded (l) where the debtor ultimately proves solvent, and generates a surplus, or (2) in certain instances where the creditor is a *secured* creditor and the security itself is either sufficient to pay interest or generates additional funds from which interest may be paid. *Id.* It is evident that these exceptions are inapplicable on the facts of this case. First, there will be no "surplus" in this Debtor's estate. The Debtor is hopelessly insolvent.[12] Second, the Issuers have no security interest in any asset.[13]

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[12] In cases arising under SIPA subsequent to the 1978 amendments to that statute, Bankruptcy Code section 726, 11 U.S.C. 726, was *specifically* incorporated into SIPA. *See* SIPA section 6, 15 U.S.C. section 78fff(e) (1980). Bankruptcy Code section 726 is a detailed program for the distribution of a debtor's general estate, including a provision for the payment of interest after all other claims are paid in full. Thus, in *In re OTC Net, Inc.*, 34 Bankr. 658, 661 (Bankr. D. Colo. 1983),

Congress did not enact SIPA in a fashion which permits annexation of SIPC's assets to the Debtor's estate. Nor is there any remotely analogous law which supports such a notion. Thus, for example, no cases support the proposition that the assets of the Federal Deposit Insurance Corporation (FDIC) or the Federal Savings and Loan Insurance Corporation (FSLIC) are considered part of an estate for the purpose of establishing a "surplus" out of which to pay post-petition interest under their respective statutory schemes. Indeed, the opposite is true. Implicit in the cited quotation from *Jamison v. Federal Deposit Insurance Corporation*, *supra*, p. 9, is the fact that any "surplus" must come from the *debtor's estate*—not from the FDIC.

The General Rule Applies To SIPA Proceedings.

The presence of SIPC in the insolvency does not change any of the foregoing. As noted above, SIPA proceedings are conducted as bankruptcy proceedings. The operative portions of SIPA were adopted, virtually word for word, from former section 60e of the Bankruptcy Act, 11 U.S.C. 96e. That section of the Bankruptcy Act was "intended to provide an exclusive procedure for determining conflicting claims between the broker's customers." *Tepper v. Chichester*, 285 F.2d 309, 311 (9th Cir. 1960). Section 60e defined "customers", who were entitled to share ratably in a "single and separate fund" (now known as "customer property") to the extent of their "net equity." SIPC is not an insurer. *SIPC v. Associated Underwriters, Inc.*, 423

SIPC recognized and supported payment of untimely filed claims *where there is a surplus in the estate*. SIPC has supported the payment of interest to claimants in cases where there has been a surplus. Unfortunately, this is not the case here.

[13] Even where the facts *might* allow a secured creditor to obtain interest from the security, the court will not always permit it. *In re Leeds Homes, Inc.*, 222 F.Supp. 20, 31 (E.D. Tenn.), *aff'd*, 332 F.2d 648 (6th Cir. 1964).

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F.Supp. 168, 171 (D. Utah 1975). SIPC advances merely augment "customer property" within statutory limits.

As noted, SIPA carried forward the basic framework of section 60e. However, in addition to the fund of "customer property," administered by the trustee of a defunct broker, SIPA created the "SIPC Fund." The "SIPC Fund," administered by SIPC, is funded by means of assessments on virtually all brokerage firms, SIPA section 4(a), 15 U.S.C. section 78ddd(a), and ultimately secured by a line of credit on the United States Treasury. SIPA sections 4(f), (g), and (h), 15 U.S.C. section ddd(f), (g), and (h). SIPC's obligation and authority to distribute the SIPC fund is strictly circumscribed by SIPA. SIPC advances to the trustee do not enhance the Debtor's estate. Further, to the extent of its advances to customers, SIPC is subrogated to all of the rights of the customers it pays. SIPA section 9(a), 15 U.S.C. section 78fff-3(a). Thus, any advances made by SIPC for customers increases SIPC's proportionate share of a debtor's estate by the amount of the advance. If interest was paid by SIPC, other creditors' claims would therefore be eligible for a smaller proportional share.

SIPC May Advance Money Only To Pay Customers' "Net Equity" Claims. "Net Equity", As Defined In SIPA, Does Not Include Interest.

As noted by the Sixth Circuit, 788 F.2d 1208, at 1211-1212, SIPA section 9, 15 U.S.C. section 78fff-3, is the *exclusive* provision which authorizes SIPC to advance funds in a liquidation proceeding.[14] SIPC may advance funds for

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[14] SIPA section 9, 15 U.S.C. section 78fff-3 provides:

SIPC ADVANCES

(a) ADVANCES FOR CUSTOMERS' CLAIMS

In order to provide for prompt payment and satisfaction of net equity claims of customers of the debtor, SIPC shall advance to the trustee

administrative expenses of the liquidation and for the completion of certain "open contractual commitments" under SIPA section 9(b) and (c), 15 U.S.C. section 78fff-3(b) and

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such moneys, not to exceed $500,000 for each customer, as may be required to pay or otherwise satisfy claims for the amount by which the net equity of each customer exceeds his ratable share of customer property, except that—

(1) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is a claim for cash, as distinct from a claim for securities, the amount advanced to satisfy such claim for cash shall not exceed $100,000 for each such customer;

(2) a customer who holds accounts with the debtor in separate capacities shall be deemed to be a different customer in each capacity;

(3) if all or any portion of the net equity claim of a customer in excess of his ratable share of customer property is satisfied by the delivery of securities purchased by the trustee pursuant to section 78fff-2(d) of this title, the securities so purchased shall be valued as of the filing date for purposes of applying the dollar limitations of this subsection;

(4) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy, directly or indirectly, any net equity claim of a customer who is a general partner, officer, or director of the debtor, a beneficial owner of five per centum or more of any class of equity security of the debtor (other than a nonconvertible stock having fixed preferential dividend and liquidation rights), a limited partner with a participation of five per centum or more in the net assets or net profits of the debtor, or a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the debtor; and

(5) no advance shall be made by SIPC to the trustee to pay or otherwise satisfy any net equity claim of any customer who is a broker or dealer or bank, other than to the extent that it shall be established to the satisfaction of the trustee, from the books and records of the debtor or from the books and records of a broker or dealer or bank, or otherwise, that the net equity claim of such broker or dealer or bank against the debtor arose out of transactions for customers of such broker or dealer or bank (which customers are not themselves a broker or dealer or bank or a person described in paragraph (4)), in which event each such customer of such broker

(c). But the only method by which SIPC may advance funds to satisfy or pay claims of any person eligible for "customer" status is clearly stated in SIPA section 9(a), 15 U.S.C. section 78fff-3(a). That section permits SIPC to advance funds to the trustee for satisfaction of "net equity claims of customers." The term "net equity" is, in turn, defined in SIPA section 16(11), 15 U.S.C. section 78*lll*(11).[15]

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or dealer or bank shall be deemed a separate customer of the debtor.

To the extent moneys are advanced by SIPC to the trustee to pay or otherwise satisfy the claims of customers, in addition to all other rights it may have at law or in equity, SIPC shall be subrogated to the claims of such customers with the rights and priorities provided in this chapter, except that SIPC as subrogee may assert no claim against customer property until after the allocation thereof to customers as provided in section 78fff-2(c) of this title.

(b) OTHER ADVANCES

SIPC shall advance to the trustee—

(1) such moneys as may be required to carry out section 78fff-2(e) of this title; and

(2) to the extent the general estate of the debtor is not sufficient to pay any and all costs and expenses of administration of the estate of the debtor and of the liquidation proceeding, the amount of such costs and expenses.

(c) DISCRETIONARY ADVANCES

SIPC may advance to the trustee such moneys as may be required to—

(1) pay or guarantee indebtedness of the debtor to a bank, lender, or other person under section 78fff-1(b)(2) of this title;

(2) guarantee or secure any indemnity under section 78fff-2(f) of this title; and

(3) purchase securities under section 78fff-2(d) of this title.

[15] SIPA section 16(11), 15 U.S.C. Section 78*lll*(11) provides:

NET EQUITY

The term "net equity" means the dollar amount of the account or accounts of a customer, to be determined by—

(A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase

"Net equity" requires the obligations of the Debtor to its customers to be quantified on the "filing date", SIPA section 16(7), 15 U.S.C. section 78*lll*(7). In this case, November 7, 1974 is the filing date. The relationship between a claimant and a debtor in a SIPA proceeding is measured at that one precise point in time. As was noted in *SEC v. Aberdeen Securities Co., Inc.*, 480 F.2d 1121, 1127 (3rd Cir. 1973) *cert. denied*, 414 U.S. 1111 (1973) the question thus posed is: What did the debtor owe the customer on the filing date? Interest, therefore, cannot be computed subsequent to that date against this Debtor's insolvent estate. This is wholly consistent with the law under the former Bankruptcy Act and the present Bankruptcy Code. *See Vanston Bondholders, supra* p. 7; 3A *Collier on Bankruptcy*, ¶63.16[1] (14th Ed. 1978).[16]

This Court has held that in interpreting SIPA, one must draw inferences "from the structure of SIPC." *SIPC v. Barbour*, 421 U.S. 412, 420 (1975). The only inference one

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on the filing date, all securities positions of such customer (other than customer name securities reclaimed by such customer); minus

(B) any indebtedness of such customer to the debtor on the filing date; plus

(C) any payment by such customer of such indebtedness to the debtor which is made with the approval of the trustee and within such period as the trustee may determine (but in no event more than sixty days after the publication of notice under section 78fff-2(a) of this title).

In determining net equity under this paragraph, accounts held by a customer in separate capacities shall be deemed to be accounts of separate customers.

[16] The law under the present Bankruptcy Code is virtually identical, in that post-petition interest is allowed a priority inferior to *all* other debts, and is paid only when to do otherwise would return money to the Debtor. *See* Bankruptcy Code section 726(a)(5)-(6). *See In re Twin Parks Limited Partnership*, 720 F.2d 1374, 1377 (4th Cir. 1983) which held that under the Bankruptcy Code, the vitality of the principles of *Vanston Bondholders, supra* p. 7, is undiminished.

can draw from SIPC's limited power to advance funds for certain purposes is that Congress did not authorize SIPC to advance funds except as specifically set forth in the statute. Under the doctrine of statutory construction *expressio unius est exclusio alterius*,

> when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. . . .'

National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974). As a consequence, the Sixth Circuit correctly held that, under SIPA, the District Court was not free to compel an award based on notions of equity. Any award of interest would do violence to the statute which controls this proceeding.

The Issuers seek to substitute their notion of equity for the equities mandated by Congress.

At bottom, the Issuers ask this court to ignore SIPA's explicit statutory provisions in favor of some supposed concept of equity. An equitable argument which seeks to avoid the plain mandate of SIPA will not prevail. As was noted in *SEC v. Packer, Wilbur & Co., Inc.*, 498 F.2d 978, 983 (2d Cir. 1974):

> [A]rguments based solely on the equities are not, standing alone, persuasive. If equity were the criterion, most customers and creditors of . . . the bankrupt, would be entitled to reimbursement for their losses. Experience, on the other hand, counsels that they will have to settle for much less. SIPA was not designed to provide full protection to all victims of a brokerage collapse.

Accord, SIPC v. Morgan, Kennedy & Co., Inc., 533 F.2d 1314 n. 4 (2d Cir. 1976), *cert. denied*, 426 U.S. 936 (1976).

Since Congress has limited what is to be advanced by SIPC to satisfy customer claims, the courts may not alter the statutory formula. It has been noted with respect to a claim in a liquidation under SIPA:

> Although this court, as it has been again and again reminded, may apply equitable principles in the exercise of its bankruptcy jurisdiction, *Bank of Marin v. England*, 385 U.S. 99 (1966), *Pepper v. Litton*, 308 U.S. 295 (1939), the exercise of judicial equity power must yield where Congress' plain words mandate otherwise. *Borgenicht v. Creditors' Committee*, 479 F.2d 150 (2d Cir. 1973).

In re Weis Securities, Inc., (Claim of Fowler) 1 Bankr. Ct. Dec. 1572 at 1573 (S.D.N.Y. 1975). It is beyond the equitable power of a bankruptcy court to say "No, the distribution scheme provided by the Act is a mistake, the rules. . . and the definition. . . are absurd and obsolete." *In re Ahlswede*, 516 F.2d 784, 788 (9th Cir. 1975). "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984).

The Sixth Circuit's refusal to award interest against SIPC is simply a recognition that to award interest on a customer's "net equity" would vitiate the precise "net equity" formula used by Congress, which measures the amount to be paid to a customer as of the "filing date." It is the exclusive remedy for customers to receive SIPC funds. Allowing post filing date interest would effectively alter the "net equity" definition to exclude reference to the filing date of the case. This would be tantamount to judicial legislation. This court has said:

> Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to es-

> cape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter.

Crooks v. Harrelson, 282 U.S. 55, 60 (1930); *accord, In re Feenstra*, 13 B.C.D. 370, 373 (Bkrtcy. W.D.N.Y. 1985).

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) stands for the proposition that courts may not alter a statutory formula for measuring an amount due under a federal statute, even where the result may be unjust or absurd. Thus, under a federal statute which measures damages for withholding wages for seamen, where the statute calls for "a sum equal to two days pay for each and every day during which payment is delayed," this court upheld an award of "over $300,000 simply because respondent improperly withheld $412.50 in wages." *Id.* at 575.

Griffin holds that where Congress has fixed a formula, the courts may not alter the formula, even if the result does an extreme hardship. Congress has measured the amount owed to the Issuers by enacting a specific formula, to wit, the customer's "net equity." Congress knows how to enact a draconian penalty for late payment—witness the *Griffin* case—but chose not to do so with SIPA. That is determinative of the issue here.

Any so called "equitable" argument to compel SIPC to pay interest in this particular case cannot be considered in a vacuum. If interest were allowed here, it would be in contravention of the general rule in bankruptcy that delays incident to litigation do not give rise to a claim for interest. *Vanston Bondholders, supra*, p. 7. More than that, however, allowance of interest against SIPC, where SIPA makes no provision for interest, would have a number of

by SIPC would effectively raise the statutory ceiling placed on the amounts SIPC is authorized to advance on behalf of any one customer.[17] The limits of SIPA protection are established (and periodically reviewed) by Congress in light of historical experience, legislative judgment, and parity with other parallel protective statutory plans administered by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, and the National Credit Union Administration.[18] The court should not upset this matrix. If post-petition interest is to be paid directly from the FDIC, FSLIC, NCUA, or SIPC, beyond the limits of any of those statutory formulas, the Congress should make this determination, not the courts.

The cases cited by the Issuers are irrelevant.

The cases cited by the Issuers in support of their position are irrelevant to the facts presented here. For example, the Issuers rely (Issuers' Petition, p.12-13) upon *Ticonic National Bank v. Sprague*, 303 U.S. 406 (1938). *Ticonic* holds that a secured creditor of a national bank in receivership may enforce his lien against his security, "where it is sufficient to cover both principal and interest, until his claim for both is satisfied." 303 U.S. at 413. Further, although that case involved the liquidation of a national bank, neither the FDIC nor any similar corporation was a party to the case. Even if the FDIC had been a party, it would not have expended any funds for

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[17] On the facts of this case, an award of interest would compel SIPC to advance sums in excess of the then existing $50,000 limits set forth in SIPA as to some, if not all, of the plaintiffs. *See* note 6, supra p. 3. Two Issuers have already been paid their maximum SIPA advance; "interest" would cause other Issuers to receive an amount in excess of the statutory limits as well.

[18] SIPA presently provides that SIPC may advance up to $500,000 for each customer claim for cash or securities of which not more than $100,000 may be advanced on claims for cash. *See* SIPA section 78fff-3(a)(1)(1982). The latter sum is identical to the maximum advances allowed by the FDIC, FSLIC, and NCUA.

either principal or interest with respect to the disputed claim because that claimant was a secured creditor seeking satisfaction from the security alone. *Ticonic* simply has no bearing on this case.

The Issuers also rely upon *First Empire Bank v. FDIC*, 572 F.2d 1361 (9th Cir. 1978), *cert. denied*, 439 U.S. 919 (1978). That case did not involve depositors insured by the FDIC. Rather, it involved some of the failed bank's general creditors. The FDIC, *as receiver*, had in effect distributed nearly all of the failed bank's assets to other general creditors, thereby depriving the aggrieved general creditors of their ratable share in the distribution as required under the National Banking Act. Because of this failure, the aggrieved creditors were entitled to *contractual* interest. However, SIPC is not the fiduciary liquidating the Debtor's estate, nor did SIPC or the trustee distribute any assets in derogation of the Issuers' rights. The Sixth Circuit considered *First Empire* and correctly held it to be inapplicable.

Finally, *none* of the cases cited by Issuers in Point II of their Petition hold that a creditor, such as SIPC, can be required to pay interest as the "price" of a good faith challenge to the validity of another creditor's claim. There are no such cases.

Instead of discussing the relevant bankruptcy precedents, the Issuers' Petition cites several non-bankruptcy damage cases for the general and obvious proposition that federal courts have the power to award interest. But even these cases are not supportive of the Issuers' position. For example, the Issuers cite *United States v. Billings*, 232 U.S. 261 (1914), which is clearly irrelevant to the case at hand. (Issuer's Petition, pp. 7, 15, 19.) *Billings* involved interest on overdue taxes.

In *Billings* the court noted "the obvious unsoundness" of the taxpayer's position, and that the taxpayer's contentions contained "the self-evident demonstration of their

want of merit." 232 U.S. 261 at 283. The court also stated previous decisions on the subject had made the result beyond dispute. *Id.* at 284. In contrast, as the Sixth Circuit stated, the question of whether the Issuers were entitled to customer status at all was a case of first impression under SIPA. *SEC v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608, 609 (6th Cir. 1982). Indeed, the Sixth Circuit decided the matter on the narrow facts of the case, stating that "[w]e do not decide whether an issuer of securities who deals with an investment banker or underwriter only in more traditional ways may be a 'customer' under the Act." 679 F.2d 608 at 613. It can hardly be said, therefore, that SIPC owed a "clear obligation" to the Issuers, as existed in *Billings*.

Second, there was no evidence in the court below that SIPC "unreasonably withheld payment on an overdue account," as required by *Billings*. SIPC, joined by the trustee, made a reasonable, good faith argument which did not prevail. The Issuers simply did not demonstrate at trial that the delay was either unreasonable or caused by SIPC.

Similarly, the Issuers make repeated mention of an "unjust enrichment" theory. (Issuers' Petition, pp. 15, 16, 18). Suffice it to say that none of these cases deals with interest in the bankruptcy context. Further, to cite one of the cases relied upon by the Issuers, an interest award based upon unjust enrichment is "to prevent one from retaining a benefit conferred upon him by another." *Hermann v. Gleason*, 126 F.2d 936 at 940, (6th Cir. 1942). But the Issuers never conferred any benefit whatsoever upon SIPC. SIPC never received funds from the Issuers; the Debtor did. SIPC did not convert the Issuers' funds; the Debtor did.

Finally, the Issuers are unable to demonstrate that there is a conflict between any of the United States Circuit Courts of Appeals on any point germaine to the above.

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Nothing in the Sixth Circuit's construction of SIPA is in conflict with the opinion of any other circuit. Nothing in the Sixth Circuit's construction of general bankruptcy law is at variance with the controlling precedents long established by this Court. The Issuers have not presented an issue worthy of review by this Court.

II. The Miscellaneous Arguments Of The Issuers Do Not Alter The Result.

The Issuers raise a number of purported errors by the Sixth Circuit. None of these errors are directly related to the "Question Presented" as stated at page (i) of the Issuers' Petition. Indeed, the Issuers' Petition spends very little time whatever on the central issue in the case. Rather, the Issuers focus on auxilliary arguments which relate to holdings made by the Sixth Circuit which are separate and independent reasons for that court's determination that SIPC should not pay interest to the Issuers on the facts of this case. Three comments are in order. First, the Sixth Circuit was correct on each point. Second, these points are not worthy of review by this Court. Third, since the Sixth Circuit determined that interest cannot be paid in this case for four independent reasons, even if three were incorrect, the end result would not be altered.

The Issuers have admitted that SIPC litigated the issue of their "customer" status in good faith. SIPA section 15(c), 15 U.S.C. section 78kkk(c), is applicable.

The Sixth Circuit noted in its first opinion in this case that the legal question of whether an issuer of securities is a "customer" of a broker as to securities being sold to the public was a case of first impression. *SEC v. Ambassador Church Finance/Development Group, Inc.*, 679 F.2d 608, 609 (6th Cir. 1982). In the subsequent pleadings on the "interest" question, SIPC repeatedly asserted, as a complete defense, that "SIPC exercised good faith in all its dealings with the plaintiffs." Answer, p.3; First Amended Answer, p. 4; Second Amended Answer, p. 9.

At the subsequent trial of the "interest" question, counsel for the Issuers specifically stated that no fault attached to SIPC for the delays in litigating the question of whether the Issuers were customers. Counsel for the Issuers also stated that SIPC litigated the question of "customer" status in good faith. This is contrary to the position which the Issuers apparently take now. (Issuers' Petition, p.17.)

The trial transcript reflects counsel's statement with respect to whether any of the parties was at fault for the litigation delays. Counsel for the Issuers told the trial court "we are not, Your Honor, saying that there is any fault here." Trial transcript, June 13, 1984, p.48, *l.* 25 through p.49, *l.* 1. Further, on the question of whether SIPC litigated the question of the Issuers' "customer" status in good faith, counsel for the Issuers noted that "SIPC is investing its funds comfortably at the U.S. Treasury bill rate, while SIPC *unsuccessfully litigates a claim in good faith*, but unsuccessfully." Trial transcript, June 13, 1984, p.51 *l.* 25 through p.52, *l.* 2. (Emphasis supplied.) At trial, counsel for SIPC noted that "there has been a statement by counsel that litigation was not conducted in bad faith, but rather the opposite." Trial transcript, June 13, 1984, p.58 *l.* 4-8.

Based on the foregoing, the Sixth Circuit was entirely justified in referring to SIPA section 15(c), 15 U.S.C. section 78kkk(c),[19] as an independent reason for holding that Congress did not intend SIPC to pay interest in this case. On the foregoing record, it is inexplicable that the Issuers

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[19] SIPA section 15(c), 15 U.S.C. section 78kkk(c), provides:

LIABILITY OF SIPC AND DIRECTORS, OFFICERS, OR EMPLOYEES

Neither SIPC nor any of its Directors, officers, or employees shall have any liability to any person for any action taken or omitted in good faith under or in connection with any matter contemplated by this chapter.

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should suggest (Issuers' Petition, p.17) that "the case should have been remanded to the District Court for discovery and argument on the issue of bad faith." The Sixth Circuit did not "render an underlying *de novo* factual adjudication based on an incomplete record," as is stated at page 17 of the Issuers' Petition. Further, SIPC specifically argued the statutory immunity point to the Sixth Circuit in its main brief. The Issuers chose not to address this point.

The Issuers allege that SIPA section 15(c), 15 U.S.C. section 78kkk(c) is somehow not applicable because the legislative history of that section demonstrates that SIPC is not relieved of its liability for its contractual obligations. (Issuers' Petition, p.18). Yet the plain and simple fact is that there is no contract between SIPC and the Issuers. In short, the Sixth Circuit made no error in relying on SIPA section 15(c), 15 U.S.C. section 78kkk(c), as a separate and distinct reason for its decision. There is no basis for this court to review the Sixth Circuit on this ground.

The Sixth Circuit correctly construed *SIPC v. Barbour*.

The Sixth Circuit stated yet another independent reason for rejecting the Issuers' claims for interest. In reliance upon *SIPC v. Barbour*, 421 U.S. 412 (1975) the Sixth Circuit held that the District Court should have dismissed this action, because "SIPA does not give customers of failing broker-dealers an implied private cause of action to compel SIPC to take action under the SIPA." 788 F.2d 1208 at 1210. The Sixth Circuit was correct.

The Issuers did not seek an award of "interest" directly against the Debtor's estate. The bankruptcy law cases, cited above pp. 7-11, provide an insurmountable barrier to such recovery. Instead, by suing SIPC, the Issuers sought to do indirectly that which they could not do directly. SIPA's "net equity" definition limits what SIPC can advance in a SIPA liquidation. To allow a private right of action to compel SIPC to advance *more* than a customer's

"net equity" would frustrate the proper administration of SIPA, and render that definition meaningless. This would lead to wholly contradictory results, at variance with SIPA. The Sixth Circuit simply refused to allow a private suit against SIPC where SIPA plainly limits the Issuers to a "net equity" against the Debtor's estate.

To be sure, *SIPC v. Barbour* does not preclude all suits against SIPC. Actions on contracts, employment discrimination, or a myriad of other types of suits could surely be brought, and nothing in *SIPC v. Barbour* is to the contrary. That is the "plain meaning" of SIPA section 3(b)(1), 15 U.S.C. section 78ccc(b)(1). Where, however, a suit pertains to the amount of funds which SIPC may advance in a SIPA liquidation proceeding, litigants are not free to initiate a suit directly against SIPC.

The Issuers assert (Issuers' Petition, p. 8) that an implied right of action permitting them to sue SIPC directly for interest can be found in SIPA, under the test set forth in *Cort v. Ash*, 422 U.S. 66 (1975). This situation is clearly outside the bounds of *Cort*. In order to permit an implied private right of action under SIPA, *Cort* requires an examination of whether such a remedy is consistent with SIPA itself. It is not.

The implied private right of action which the Issuers seek to impose here is in direct *conflict* with those portions of SIPA which limit, with mathematical specificity, the amount a customer may receive in a SIPA proceeding. First, as noted above, the Issuers seek to impose a requirement upon SIPC to advance funds beyond the amount of each customer's "net equity." SIPA's "net equity" definition is a manifest expression of Congressional intent to limit SIPC's advances. It would be utterly inconsistent with the legislative intent of SIPA to circumvent this clearly defined limit by allowing a separate suit against SIPC for additional advances.

Second, any implied private right of action permitting recovery directly from SIPC, is at odds with SIPA section 9(a), 15 U.S.C. section 78fff-3(a) which states that SIPC may only advance funds *to the trustee*—not to customers directly.

Third, SIPA as presently enacted *does* permit customers to initiate a suit in one specific situation: when SIPC is acting in a "Direct Payment Procedure." *See* SIPA section 10(e), 15 U.S.C. section 78fff-4(e). It would therefore be contrary to the *expressio unius* doctrine to permit customer lawsuits in other contexts. For the foregoing reasons, a private right of action is not consistent with SIPA.

In short, when interpreting SIPA, and drawing inferences "from the structure of SIPC," *SIPC v. Barbour*, 421 U.S. 412 at 420, (1975), no implied right of action is consistent with SIPA in this case. In light of (1) the fact that the Sixth Circuit correctly construed *SIPC v. Barbour* and (2) the other independent reasons for denying relief to the Issuers, this ancillary question raised in the Issuers' Petition (pp. 6-11) is not worthy of review by this court.

The Issuers' reliance on 28 U.S.C. Section 1961(a) is misplaced.

A final point deserves brief mention. The Issuers maintain (Issuers' Petition, p.20) that the Sixth Circuit erred in not awarding interest to them for the period between the judgment in the "Pine Street" test case on "customer" status, and the advances by SIPC to the trustee on their behalf. The short answer to this is that Sixth Circuit's first opinion on this matter, 679 F.2d 608 (6th Cir. 1982), did *not* award a specific dollar amount to any Issuer. Indeed, the trustee requested that SIPC advance sums *beyond* the amount of the Issuers'claims for their "net equity." First, there was an active dispute *as to the amount*. Second, the "net equity" definition limits, with mathematical precision, the maximum amount SIPC may

advance in this liquidation. This issue is not worthy of review by this court.

CONCLUSION

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI.

Dated: August 21, 1986

Respectfully submitted,

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